No. 89-1290

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

Robert R. Freeman, et al.,

Petitioners,

v.

Willie Eugene Pitts, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF AMICUS CURIAE OF THE NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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B. Demographic changes may require school districts to modify desegregation plans.

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Counsel for both parties have consented to filing of the within brief.

INTEREST OF THE AMICUS CURIAE

The National School Boards Association (NSBA) is a nonprofit federation of this nation's state school boards associations, the District of Columbia school board and the school board of the Virgin Islands. Established in 1940, NSBA is the only major educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

School desegregation continues to be one of the most pressing issues in this country. NSBA submits this brief in the belief that the issues presented in this case must be decided so school districts

can be in a better position to address the continuing problem of racial isolation in the schools. In light of today's economic climate, it is important that every child, regardless of race, color, or national origin, be provided equal opportunities in the public schools of this country. It is also imperative that national rules be established so that the residents of all communities throughout the nation can feel that the school board in their community is subject to the same constitutional standards as the boards in every other community.

STATEMENT OF THE CASE

Amicus incorporates by reference the statement of the case in Petitioner's brief herein.

REASONS FOR GRANTING THIS WRIT

I. The importance of advancing the desegregation efforts of public schools

compels this Court to clarify the law on the nature and effect of achieving unitary status.

II. Demographic changes and federal government actions necessitate this Court's immediate guidance on the issues regarding unitariness.

A. Demographic changes may require school districts to modify desegregation plans.

B. School districts need clarification on the effect of a dismissal of a desegregation case in light of the U.S. Department of Justice efforts to reduce its case load.

III. This Court has an opportunity to resolve the issue of what constitutes a unitary school system and the effect of unitariness at the same time.

ARGUMENT

I. The importance of advancing the desegregation efforts of public schools compels this Court to clarify the law on the nature and effect of achieving unitary status.

There are few matters of public policy more important to every member of a community than those involving the desegregation of its public schools.

Changes in student assignment can be enormously disruptive to a community even when motivated by reasons other than desegregation. The decision to close one school, for example, is always made with great care because it will undoubtedly result in complaints from students, parents and faculty. Even members of the community who have no current direct relationship with the schools become very emotional on this issue because of the ties they feel to "their school." Those problems are multiplied manyfold when the board reassigns students at a number of schools for purposes of desegregation. And, unlike the situation in the past, we are now in an era where both white and black parents may be lobbying the board to return to neighborhood schools or, at the least, urging the board to maintain stability in student assignment.

In the case at bar, the court of appeals ruled that until the school district is "unitary" in all respects (not merely in student assignment), the district cannot defend disproportionately minority or majority schools on the basis that there was no causal connection between racial makeup and the unconstitutional conduct. Under the decision, the district must affirmatively desegregate its schools and consider using methods including busing, "regardless of whether the plaintiffs support such a proposal." This may, indeed, be an appropriate directive. But, given the broad base of support for a neighborhood student assignment plan, the court of appeals' decision should be founded on a national standard and not merely on the ruling of one court of appeals.

It is imperative that the public perceive that decisions of the local school board and of the federal courts are based on the "law of the land." Currently, there is no "law of the land" relative to the question of when a formerly de jure segregated school system becomes "unitary."

This Court has ruled that state mandated segregation violates the Constitution, Brown v. Board of Education, 347 U.S. 483 (1954), and has expanded the coverage of the fourteenth amendment to include other forms of de jure segregation. Keyes v. Denver School District No. 1, 463 U.S. 189 (1973). The Court has clarified the obligations of school districts to remedy the effects of de jure segregation: first, by requiring school boards to take an active role in the desegregation process and not

merely rely on student "freedom of choice," Green v. County School Board, 391 U.S. 430 (1968); and second, the Court has ruled on the various methods of desegregation including cross-town busing Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971). The Court has clarified the role of the state in the process. Milliken v. Bradley, 433 U.S. 267 (1977). The Court has also ruled that a state cannot restrict by statute school district efforts to desegregate voluntarily. Washington v. Seattle School Dist. No. 1, 458 U.S. 457 (1982). Of course, none of these areas of the law is simple and because of the variety of factual settings in which the legal issues are presented, nuances have developed with regard to these major legal principles.

But the issues presented to the

Court in this case are, indeed, new and perhaps even more difficult than those of the past. Desegregation decisions are among the most difficult with which school boards must contend. Politically, any course a school board takes is fraught with controversy. Thus, it is important that all the players know the rules.

The National School Boards Association (NSBA) does not have a position on the issues presented in this case, and in the event this Court agrees to hear the case, NSBA will not file a brief on the merits. School board members are not of one mind on the policy issues involved in this case but boards in every formerly de jure school district agree that they need to know the legal parameters in which they are operating in order to work with their communities to

make and enforce effective student assignment policies.

School boards in formerly de jure segregated school systems need to know after their desegregation plans have been implemented for a number of years, what standards the trial court should use in releasing them from further obligations to make changes in system operations. Must they be in compliance with all aspects of the plan for a specified time before being eligible for release from any obligations? Do a district's obligations continue even after a finding of unitary (once the causal connection is broken)?

There are public relations benefits to be gained by a declaration of "unitary," as well as the benefit of being released from the burden of reporting requirements. But undoubtedly

the primary reason that a district seeks "unitary" status is to regain control over the administration of its public schools. School districts need to know the process for achieving "unitary" status and the effect of having achieved that status.

Undoubtedly a number of refinements need to be made in the law regarding the first stage of desegregation, i.e., the stage leading up to and including the approval of the desegregation plan. But most districts that have been under desegregation plans for a number of years are now in the second stage for which this Court has not developed the major legal principles.

Amicus submits that districts urgently need the answers to two questions: First, when does the duty of a formerly de jure segregated school

district to actively remedy racial imbalance end? That is the issue here. The second question is when, if ever, formerly de jure segregated school districts regain the right to make student assignment decisions without regard to the effect on the court-ordered desegregation plan? That issue is squarely presented in the case of Dowell v. Board of Education of Oklahoma City Public Schools, Independent School District No. 89 890 F.2d 1483 (10th Cir. 1989), petition for cert. filed, 58 U.S.L.W. 3469 (U.S. Jan. 3, 1990) (No. 89-1080) in which Amicus has also filed a brief in support of the petition for certiorari. That issue is also partially presented here because the dispute in this case did not arise until the school board successfully sought a declaration from the district court that it had

achieved "unitariness" in the area of student assignment. The board argues that because it is unitary in student assignment, it is free to pursue race neutral student assignment policies, provided its actions are not taken for the purpose of segregation. Plaintiffs argue that the board is not free to make changes in student assignment because the school system is not "unitary" in all six "Green" factors.

School boards like the DeKalb County School system have a difficult conflict before them in making decisions on student assignment. One set of parents believe that a system of neighborhood schools is the most appropriate way to assign students to schools and, since the district was found "unitary" as to student assignment, they argue that the district is free to maintain a system of

neighborhood schools. Another set of parents asserts that the board must continually make changes until the entire system is "unitary,"

What Amicus seeks is stability. If the Court rules that school districts that retain aspects of the former dual school system are obligated to alter student assignment schemes to remedy de facto segregation, so be it. At least then each school board knows that its policy considerations must be formulated with this Court's standards in mind. If its obligation cannot be met through the retention of a neighborhood plan, then school districts will have to seek other ways to meet the challenges posed by increasing minority populations. On the other hand, if this Court determines that a school system can be held "unitary" in student assignment, even absent

unitariness in other respects, school boards whose districts have been declared to be "unitary" in student assignment will know that they can now operate their districts without court oversight (provided, of course, that this Court agrees that a declaration of "unitary" results in this flexibility.)

As noted earlier, whatever decision a school board makes in this sensitive area is going to be the subject of controversy. Decision-making is even more difficult if the law is unclear. Where the law is clear and school boards operate within the confines of the law, history has shown that desegregation works. Now that formerly segregated school districts are administered by whole new sets of personnel, there is reason to believe that some stability in the law will lead to stability in

desegregation efforts.

II. Demographic changes and government actions necessitate this Court's immediate guidance on the issues regarding "unitariness."

A number of lower courts have addressed the issue of "unitary." Some establish standards for determining "unitariness" while others find "unitariness" or a lack of "unitariness" without setting forth the standards on which the finding is based. The only uniform finding by these courts is an acknowledgment that the Supreme Court has not ruled on this issue. "Although the Court has produced no formula for recognizing a unitary school system...." Morgan v. Nucci, 531 F.2d 313, 319 (1st Cir. 1987); "Although the Court has produced no formula for recognizing a unitary school system...."; U.S. v. Overton, 834 F.2d 1171, 1177 (5th Cir.

1987); "The Supreme Court has not, however, announced any set list of the conditions a district court judge must observe in a formerly dual school system before declaring that it is unitary. [Citations omitted]." Pitts v. Freeman, 887 F.2d 1438, 1445 (11th Cir. 1989). This case is more straightforward than other cases raising the issue of "unitariness" because the school board does not wish to change the neighborhood student assignment system in its desegregation plan. The board only seeks the right to assign students on a race neutral basis.

But the DeKalb dilemma as to the nature of a finding of "unitariness" is a national dilemma. Because of the federal government's recent action in attempting to reduce its desegregation case load and because demographic changes are altering

the complexion of the schools, many school districts are "between a rock and a hard place." They must make decisions now on whether to seek "unitary" status. In order to do that, they must be aware of the parameters the courts will be looking at in order to prove that the district is now "unitary," and they must know the effect of having achieved that status.

A. School districts need clarification as to the effect of a dismissal of a segregation case in light of the U.S. Department of Justice's efforts to "close down" cases in order to reduce its case load.

In the Spring of 1988 the U.S. Department of Justice announced that it was planning to seek dismissal of more than 200 school district desegregation cases where the districts have fully complied with court-ordered plans for a minimum of three years. Education Week

June 1, 1988, at 18-19. Representatives of the Department of Justice Civil Rights Division of stated that the present Administration plans to continue the process of "close down." Remarks of Nathaniel Douglas, Chief, Educational Opportunity Litigation Section, Civil Rights Division, Department of Justice. From the community standpoint, it is, of course, preferable to be relieved from the jurisdiction of the court so that the board can make decisions based on educational needs of all children and be freed of administrative tasks such as preparing reports to the court and the plaintiffs. Arguably, it is also in the interest of the trial courts to be relieved from the duty of routinely deciding all manner of issues relating to student assignment and other matters included in the desegregation order.

On the other hand, the process of achieving a court order dismissing the case and declaring the district "unitary," is expensive, can cause community anxiety and unrest and can be disruptive of the educational process. For these reasons, left to their own devices, many districts might opt to remain under court order. But as long as the Department of Justice continues to seek dismissals of these cases, the districts are left with the unenviable alternatives of either joining with the Department in seeking dismissal or opposing the Department's action. The latter course is really no alternative at all because the district would have to admit that it is not meeting its obligation to eliminate racial discrimination "root and branch." Green v. County School Bd., 391 U.S. at 438.

Therefore, school districts and, indeed, the Department of Justice, itself need clarification from this Court as to the standards for determining when a district becomes "unitary."

As part of the effort to "close down" its caseload, the Reagan Administration encouraged districts to dismantle their plans and adopt neighborhood student assignment plans. Although DeKalb seeks to retain the student assignment system in its desegregation plan, a number of other school districts seeks a declaration of "unitariness" in order to change the plan. The Reagan Administration dropped some of the Justice Department desegregation lawsuits begun in the previous Administration and changed its position in cases such as that involving the validity of the Washington State

statute which prohibited voluntary busing for desegregation. This "kind of dramatic, high visibility leadership" has resulted in both school officials and members of the public assuming that the era of busing and court-ordered desegregation is over. G. Orfield, Racial Change & Desegregation in Large School Districts -- Trends through the 1986-1987 School Year, (NSBA Council of Urban Boards of Education, July 1988), (hereafter, Orfield Report).

It is unfair to the hundreds of school districts who are under court-ordered desegregation plans for the federal government to lead them to believe that they can freely go into court and be relieved of all obligations to justify future student assignment actions that have a segregative effect -- if, indeed, this Court is going to rule

at some future time that school boards are not free to take such action.

It is counterproductive to wait until after the school district has reassigned its students -- with the concomitant public unrest that such action always causes -- to decide that the action taken must be subjected to a degree of scrutiny that the district may not be in a position to meet. Again, whether such a degree of scrutiny is justified is not the point. The point is that districts are entitled to know the standards now.

B. Demographic changes may require school districts to modify desegregation plans.

NSBA recently conducted a survey of the members of its Council of Urban Boards of Education (CUBE), to which 74% of the members responded. The districts that comprise CUBE are our nation's

largest districts, educating more than four million children in America's urban public schools, 10% of the total public school student enrollment. The survey asked the districts a number of questions about desegregation. In the school systems responding to the survey, non-white students accounted for two-thirds of all students. Only three of the fifty-two school districts surveyed never had a desegregation plan. Forty districts are currently involved in desegregation efforts, fifteen of which are operating under plans different from those originally ordered. As demographics change, school districts are responding by seeking changes in court orders or orders declaring the district unitary. Others are waiting for additional guidance from the courts.

However, school districts of this

size cannot remain static. They must change as circumstances -- such as demographics -- change. The white population is decreasing and the

> school enrollment statistics are telling us about a new, profoundly multi-racial society that neither our political leaders, research community, nor media have yet fully recognized. Teachers and school officials are dealing with a society that has changed dramatically since the time of our grandparents and that is continuing to change very rapidly.
>
> Orfield Report, at 2.

See Appendix for an analysis of racial changes in student populations in 60 largest U.S. cities. Data in the Appendix is derived from Orfield Report, at 4-9.

In absence of guidance from this Court, boards make changes at their peril and in some cases, fail to make changes at their peril. Given the intensity of community feelings on the issue of

desegregation, it is unfair to force school boards to make policy decisions that affect the entire community without a better picture of the legal framework in which they must operate. If the board decides to make changes in its student assignment plan after a finding of "unitariness" in that part of the plan -- opponents point to the court of appeals decision in the case at bar and the decision in Oklahoma City, to argue that the action is illegal. If the board decides to retain its desegregation plan and make changes to reduce racial isolation, opponents point to Morgan v. Nucci, 831 F.2d 313 (1st Cir. 1987), in which the First Circuit Court of Appeals held that the district court cannot impose its own student assignment plan on the Boston public schools if the system has achieved "unitary" status in student

assignments. The court calls the "question of what constitutes unitariness 'the central riddle of the law of school desegregation.' [Citation omitted]" Id.

Unfortunately, when the law is unclear, the debate centers on prognostications as to what the Supreme Court will or will not do rather than on policy issues such as whether "white flight" is the cause of racial isolation in DeKalb County, Georgia, Oklahoma City, or anywhere else or is it caused by a decrease in the white birth rate or by a movement to the suburbs by both whites and minorities? If the cause is white flight, will a return to neighborhood schools reduce that flight? If not, what other means exist for reducing the current racial isolation? If the district is operating under a neighorhood plan, should it opt for a different form of student

assignment plan in order to reduce isolation. All of these issues should be studied in the community in an environment where the basic legal principles are settled. Citizens, courts, and the federal government have argued over the years that local school districts should be left to themselves to effect the management decisions that result in the desegregation of their schools. Who is in a better position than the locally selected and accountable school board to call in the members of the community to discuss these issues that affect all of the community? Who is in a better position to organize citizen involvement in developing alternative assignment plans? Who is in a better position to ensure that teachers and administrators are trained to deal with the myriad problems entailed in the development of an

effective desegregation effort?

Most importantly, who better than the school board is in a position to ensure that the desegregation effort works and is not merely an agonizing and futile exercise? Desegregation plans and plans handled voluntarily and cooperatively, with the full participation of the local school board, administrators, teachers and community leaders, are invested with the potent opportunity of ensuring that the community understands why the action is being taken and is given reason to believe that it has contributed to the plan and stands to lose if the plan fails. A plan developed with the cloud of probable federal court intervention has much less chance of working.

> No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the

> maintenance of community concern and support for public schools and to quality of the educational process...local control over the educational process affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs, and encourages experimentation, innovation and a healthy competition for education excellence.
>
> Milliken v. Bradley, 418 U.S. 717, 741-42 (1974).

Citizens in the school districts which have been subject to desegregation orders are urging their school boards to play exactly what this Court has indicated is their traditional role and to take control over the educational process. There also continues to be a demand by parents for neighborhood schools. This Court has indicated some support for neighborhood schools. "All things being equal, with no history of discrimination, it might well be

desirable to assign pupils to schools nearest their homes." Swann, 402 U.S. at 28. The key is determining what is "equal." In the absence of guidance from this Court as to the parameters under which formerly de jure segregated systems must operate, school districts remain in the dark as to who has the final control over student assignment decisions -- the board or the courts.

Amicus urges this Court to tackle these difficult issues now. School boards need guidance and any delay could cause needless harm to the educational process in those communities where the board is delaying action because of a fear of reversal or is taking action only to be reversed after the action has been taken. Unlike other cases, the acts or failures to act in a desegregation case affect an entire generation of young

people. They affect the entire community and its view of the educational system.

III. This Court has an opportunity to resolve the issue of what constitutes a unitary school system and determine the effect of a declaration of unitary at the same time.

Amicus further submits that the timing is right for this Court's intervention into these issues for another reason. Another desegregation case is presently before the Court on a petition for certiorari which raises the issue of the effect of a declaration of unitariness. In the case of Board of Education of Oklahoma City Public Schools, Independent School District No. 89 v. Dowell, the Court of Appeals for the Tenth Circuit held that a formerly de jure segregated school district has the burden of proof to justify any changes in the desegregation plan, even if the district had earlier been held to be

"unitary." The questions of first, when a district is unitary and second, whether the district is then free to make changes in the plan are very closely intertwined. "The elements of a violation and who must bear the burden of their proof are not conceptually distinct from unitary status but are its components; indeed, the contrary assertion is dissembling." United States v. Overton, 834 F.2d 1176 (5th Cir. 1987).

Since it is improbable that a single case will raise both the threshold issue of when a district becomes "unitary" and the companion issue of the effect of a declaration of "unitary," this would seem an appropriate time for the Court to review both issues. Since it is difficult to address one issue without also addressing the other, it may be easier for the Court to resolve both

issues with the benefit of the arguments of the parties to both cases.

IV. Conclusion

Amicus submits that because of the Department of Justice's action in seeking to dismiss numerous cases in their desegregation case load and because of the inconstancy of student demographics, school districts need advice from this Court on the second stage desegregation issues relating to the nature and effect of a declaration of "unitary" status. Because desegregation activities are so compelling, and because school districts are being forced to make decisions even in absence of guidance from this Court, it can almost be said that the content of

this Court's rulings on these issues is less important than the need for the rulings to come now.

Respectfully submitted,

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APPENDIX

CHANGES IN STUDENT ENROLLMENT IN LARGEST SCHOOL DISTRICTS 1967-1986

DISTRICT	TOTAL STUDENT POPULATION CHANGES		WHITE/BLACK CHANGES	
	TOTAL CHANGE	TOTAL % CHANGE	% CHANGE WHITE	% CHANGE BLACK
New York	-155145	-14	-26	8
Los Angeles	-65246	-10	-37	-4
Chicago	-147231	-26	-27	5
Dade Co., FL (Miami)	23679	11	-40	9
Houston ISD	-61886	-24	-37	10
Philadelphia	-92768	-33	-15	5
Detroit	-133331	-46	-32	31
Dallas ISD	-24330	-15	-42	19
Fairfax Co., VA	23955	22	-19	6
Broward Co., FL	37949	40	-9	2
Baltimore	-73916	-38	-17	15
Hillsborough Co., FL	20732	22	-11	1
Memphis	-10314	-8	-24	24
San Diego	-10680	-9	-32	7
Prince Geo. Co., MD	-33476	-25	-55	48
Duval Co., FL	-19143	-16	-12	8
Montgomery Co., MD	-16858	-15	-27	11
Clark Co., NV	32056	51	-11	3

DISTRICT	TOTAL STUDENT POPULATION CHANGES		WHITE/BLACK CHANGES	
	TOTAL CHANGE	TOTAL % CHANGE	% CHANGE WHITE	% CHANGE BLACK
Jefferson Co., KY	-44264	-32	-27	26
Milwaukee	-37936	-30	-37	29
Pinellas Co., FL	14228	19	-4	2
Palm Beach Co., FL	25600	43	-9	-1
Washington, DC	-64281	-43	-4	-1
New Orleans	-24446	-22	-26	21
Orange Co., FL	11325	16	-16	8

DISTRICT	TOTAL STUDENT POPULATION CHANGES		WHITE/BLACK CHANGES	
	TOTAL CHANGE	TOTAL % CHANGE	% CHANGE WHITE	% CHANGE BLACK
Albuquerque	936	1	-6	1
Baltimore Co., MD	-41780	-35	-14	10
Cleveland	-76202	-50	-18	13
Charlotte	-5300	-7	-13	11
Salt Lake	35117	94		
DeKalb Co., GA	-5891	-8	-46	42
Mobile	-8998	-12	-4	3
San Francisco	-32395	-33	-27	-5
Ft. Worth	-17080	-20	-32	11
Atlanta	-47192	-41	-34	33

DISTRICT	TOTAL STUDENT POPULATION CHANGES		WHITE/BLACK CHANGES	
	TOTAL CHANGE	TOTAL % CHANGE	% CHANGE WHITE	% CHANGE BLACK
Columbus	-41843	-39	-21	19
Long Beach	-8019	-11	-48	11
Anne Arundel Co., MD	1807	3	-3	0
Virginia Beach City	24010	62	-9	3
Nashville	-30833	-33	-13	10
Cobb Co., GA	23271	60	-4	2
El Paso ISD	2139	4	-20	2
Jordan, UT	40955	204	-5	0
Austin ISD	21255	54	-34	1
Denver	-34705	-37	-29	8

DISTRICT	TOTAL STUDENT POPULATION CHANGES		WHITE/BLACK CHANGES	
	TOTAL CHANGE	TOTAL % CHANGE	% CHANGE WHITE	% CHANGE BLACK
Boston	-31442	-34	-47	21
Polk Co., FL	8225	16	-2	-1
Fresno USD	-4557	-7	-28	2
Wake Co., NC	33555	137	NA	NA
Jefferson Parish, LA	2218	4	NA	NA
Tucson	3453	7	-11	1
Newark	-25151	-32	-12	-6
Cincinnati	-34993	-40	-19	19
Caddo Parish, LA	-6017	-10	NA	NA
Portland	-27025	-34	-16	7
Oakland USD	-17354	-25	-23	10

DISTRICT	TOTAL STUDENT POPULATION CHANGES		WHITE/BLACK CHANGES	
	TOTAL CHANGE	TOTAL % CHANGE	% CHANGE WHITE	% CHANGE BLACK
Greenville	-4868	-9		
Indianapolis	-57989	-53		
TOTAL	-1188420	-15		
AVERAGE	-20490	-01.8		